Supreme Court U.S.
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(2)

NO. 90-1836

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

HETTIE M. MINNICKS,
as Executrix of the Succession
of Stephen A. Mistich
Petitioner,

versus

BRANDON L. MISTICH,
REBECCA MISTICH TERRASE,
and PATRICIA MONROE MISTICH, as natural tutrix
of SHAWN A. MISTICH

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE LOUISIANA STATE COURT OF APPEAL,
FOURTH CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION TO THE PETITION

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QUESTIONS PRESENTED FOR REVIEW

Whether this Honorable Supreme Court of the United States, The Supreme Court of the State of Louisiana, and the Louisiana Court of Appeal, Fourth Circuit, all erred in denying the substitution and intervention of decedent's executrix into the pending litigation in which decedent's children had correctly been substituted as plaintiffs-appellees.

LIST OF PARTIES

The parties involved include those set forth in the caption, as well as Brown & Root, Inc., an original defendant in this matter. The parent and subsidiary companies of Brown & Root, Inc. have been previously listed in the Petition for Writ of Certiorari. These parties represent the identical ones involved in the previous Petition for Writ of Certiorari filed by the same party on the same issue back on December 13, 1990.

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DECISIONS BELOW

1. Judgment in favor of original plaintiff Stephen A. Mistich in the 25th Judicial District Court for the Parish of Plaquemines, State of Louisiana, dated April 28, 1989.

2. Order of the Louisiana Court of Appeal, Fourth Circuit, substituting decedent's children as plaintiffs-appellees, dated January 8, 1990.

3. Denial by the Louisiana Court of Appeal, Fourth Circuit, of the executrix's motion to be substituted, as well as denial of motion to stay proceedings filed by Brown & Root, Inc., dated June 1, 1990 (Appendix 1).

4. Denial by the Louisiana Court of Appeal, Fourth Circuit, of peremptory exception of no right of action filed by Brown & Root, Inc., dated September 4, 1990 (Appendix 2).

5. Denial by the Supreme Court of the State of Louisiana of application for supervisory and other writs filed by the executrix, dated September 14, 1990 (Appendix 3).

6. Denial by the Louisiana Court of Appeal, Fourth Circuit, of the petition for intervention filed by the executrix, dated December 28, 1990 (Appendix 4).

7. Denial by the Supreme Court of the State of Louisiana of application for writ of certiorari or review filed by the executrix, dated February 22, 1991 (Appendix 5).

8. DENIAL BY THE SUPREME COURT OF THE UNITED STATES OF PETITION FOR WRIT OF CERTIORARI FILED BY THE EXECUTRIX, DATED FEBRUARY 19, 1991 (Appendix 6).

STATEMENT OF JURISDICTION

The jurisdiction of this Honorable Court is questioned to the extent that this Honorable Court has already addressed and disposed of a previous Petition for Writ of Certiorari filed by the executrix on December 13, 1990, pertaining to precisely the issue presented herein.

STATEMENT OF THE CASE

On December 2, 1986, Stephen A. Mistich (hereinafter sometimes referred to as "Mistich") filed suit in the 25th Judicial District Court for the Parish of Plaquemines, State of Louisiana, pursuant to the "saving to suitors" clause, seeking tort damages for his injuries against Brown & Root, Inc. and other defendants. Several weeks prior to trial, Mistich settled his claims against all co-defendants, except Brown & Root, Inc., and therefore released the former.

After a full trial on the merits lasting seven days, judgment was rendered on April 28, 1989 in favor of Mistich and against Brown & Root, Inc. awarding $3,147,000.00 in compensatory damages and imposing $4,000,000.00 in punitive damages. Reasons for Judgment, thoroughly explaining the trial court's decision, were issued on May 25, 1989.

Subsequent to the rendering of the judgment and prior to the issuance of the reasons for same, Mistich died.

Brown & Root, Inc. suspensively appealed to the Louisiana Court of Appeal for the Fourth Circuit on May 31, 1989.

On January 8, 1990, decedent's children, Brandon L. Mistich, Rebecca Mistich Terrase, and Patricia A. Mistich, as natural tutrix of Shawn A. Mistich, were substituted as proper party plaintiffs based upon Louisiana Code of Civil Procedure Article 801, Rule 2-9 of Uniform Rules of Louisiana Courts of Appeal, and Louisiana Civil Code Article 2315.1.

On March 12, 1990, the Court of Appeal entertained oral arguments by Brown & Root, Inc. and the aforenamed children on behalf of the decedent Mistich. No other representative of Stephen A. Mistich existed at this time.

On April 4, 1990, nearly one year after judgment was rendered and nearly one month after oral arguments were heard by the Court of Appeal, the executrix of decedent's estate was confirmed in such capacity and sought to be substituted as the sole proper party plaintiff-appellee.

Interestingly enough, while recognizing that this case arises under the Jones Act, 46 U.S.C. Section 688, and the general maritime law, the executrix conceded that Louisiana Code of Civil Procedure Article 801 and Rule 2-9 of the Uniform Rules of Louisiana Courts of Appeal, controlled the substitution of parties.

However, the executrix erred in relying upon Louisiana Code of Civil Procedure Article 801(2) and not 801(1). The executrix clearly misinterpreted Article 801 in support of her assertion that the estate was the correct party to be substituted for the decedent.

After supporting the applicability of Louisiana procedural law, the executrix changed horses and cited two federal maritime cases, Sea-Land Services, Inc. v. Gaudet, 414 U.S. 573, 94 S.Ct. 806, 39 L.Ed.2d 9 (1974) and Connors v. Gallick, 339 F.2d 381 (6th Cir. 1964) as authority for her proper party status, citing the dissenting opinion of Justice Powell in Gaudet as authority.

On June 1, 1990, the Court of Appeal correctly denied the executrix's Motion to Substitute, citing Nathan v. Touro Infirmary, 512 So.2d 352 (La. 1987), a case fully supporting the position that Louisiana Code of Civil Procedure Article 801(2) applies strictly to property damage or contract cases, but not to personal injury cases.

On June 26, 1990, the executrix applied for supervisory and other writs to the Louisiana Supreme Court, which writs were

denied on September 14, 1990, further confirming that the children of Mistich are the proper parties in interest to this lawsuit.

On September 4, 1990, the Court of Appeal, in denying Brown & Root, Inc.'s Peremptory Exception of No Right of Action, ruled:

> **MOTION IS DENIED.**
>
> The peremptory exception of no right of action brought by Brown & Root, Inc. is denied. Under the circumstances of this case the children of Stephen A. Mistich were merely substituted as proper parties plaintiff in a personal injury claim which their father had already asserted and had obtained judgment. This is not a situation where there exists a "survival action" claim to be prosecuted and therefore the rules under the Jones Act and general maritime law relative to what party has the right to assert the claim does not apply.
> (See Appendix 2.)

Having been unsuccessful in her prior attempts to be recognized as the real party in interest and justly so, on November 14, 1990, the executrix planned a new strategy, couched her arguments in new terms, and filed a different pleading, a Motion to Intervene, all in an effort to accomplish the same goal.

However, this time, the executrix pulled out all of the stops. After conceding that the procedural substitution was indeed a matter governed by Louisiana state law, she lent a significant portion of her supporting memorandum to matters both irrelevant and which were neither in the record nor before the Court of Appeal.

In sheer desperation, the executrix referred to a will that purportedly left Mistich's sole surviving children next to nothing, thus deliberately insinuating a negative relationship between the decedent and his children, seeking to invoke prejudice. Although respondents vehemently dispute such a relationship, this discussion is germane to no aspect of this appeal and has absolutely no relevance in this Honorable Court's decision-making process. The conclusion that the executrix's motive was to invoke prejudice is inescapable given the fact that in a prior pleading, her Memorandum in Opposition to Brown & Root, Inc.'s Motion to Stay, the executrix admitted:

> "Mr. Mistich's testacy or intestacy is completely irrelevant to the legal issues in the appeal of this case to this Court. Brown & Root, Inc.'s motion for a stay does not and cannot expressly assign any actual legal significance herein to the will. Indeed, there is none."

Therefore, as expected, on December 28, 1990, the Court of Appeal denied the executrix's Motion to Intervene, ruling that in accordance with La. C.C.P. Article 801 and La. C.C. Article 2315.1, the proper parties to be substituted as the legal successors are the children of Mistich.

On January 17, 1991, the executrix once again applied for a writ of certiorari or review to the Louisiana Supreme Court, which writ was once again denied on February 22, 1991.

Concurrently, the executrix asked this Honorable Supreme Court of the United States to review this issue when she filed a Petition for Writ of Certiorari on December 13, 1990. In that writ application, executrix argued her position from a procedural and substantive viewpoint. This Honorable Court apparently saw no merit in such arguments and denied the petition on February 19, 1991.

Now, however, the executrix appears before this Honorable Court once again arguing the same issues she did previously, but contending that her argument is somehow different this time. Interestingly, the executrix fails to mention her previous writ application to the Supreme Court of the United States in her list of the pertinent decisions below.

SUMMARY OF ARGUMENT

The issue before this Honorable Court regarding the executrix's right to intervene or be substituted in this personal injury litigation in place of decedent has been argued twice before the Louisiana Court of Appeal, Fourth Circuit, twice before the Louisiana Supreme Court, and once before this Supreme Court of the United States. Each and every time, the executrix has been correctly denied any right of intervention into the pending proceedings. Yet she has now returned once more with the same argument made to this Honorable Court in her previous writ application, thus compelling decedent's children to respond once again to an issue that has already been adjudicated. Respondents submit that such abuse of the appellate process is a waste of time and resources for both the courts and the litigants involved.

ARGUMENT

Once again, the sole surviving children of decedent, Stephen A. Mistich, are forced to respond to yet another writ application filed by Hettie M. Minnicks, the executrix of decedent's estate, whose obvious intention is to interfere with the progress of the pending personal injury litigation and somehow obtain the fruits of a judgment which lawfully belong to decedent's children. The

executrix has presented her argument over and over again, yet has been correctly denied any right to intervene in the litigation by both the state courts and this Honorable Court.

The chronology of the various pleadings filed by the executrix need not be recited at this point, as it has previously been set forth in this opposition. However, it is important to note that the executrix initially asserted the application of state procedural law, declaring that it mandated her substitution as the proper party appellee in the proceedings. After having this attempt fail throughout the appellate ladder, the executrix planned a new strategy, abandoned her previous assertions that state procedural law applies, and declared that it is really the federal substantive law that governs whether she is allowed to become involved in the litigation. It is clear that the executrix is merely hoping to achieve her ends one way or the other. Her intention, to lay claim to the significant money judgment to which decedent's children are rightly entitled, is readily apparent and should not be supported.

Furthermore, the executrix all but ignores the fact that she previously filed a writ application to this Honorable Court on the same issue she is now presenting. In fact, she even fails to advise this Honorable Court of same in her listing of decisions below. The truth, however, is that this writ application is redundant, requesting relief which has been denied once before by this United States Supreme Court. One need only review the executrix's prior writ application filed on December 13, 1990 to realize the duplicative nature of the arguments made. A comparison of the "Questions Presented For Review" in each writ clearly illustrates the repetition:

QUESTIONS PRESENTED FOR REVIEW

In a Jones Act and general maritime law personal

injury case in state court under the "saving to suitors" clause, when the plaintiff seaman dies after award of a trial court judgment in his favor but before decision on the defendant's appeal:

1. Does federal maritime law or state law determine who is the proper beneficiary of the judgment and who is the proper party to be substituted for the deceased seaman.

2. Does federal maritime law designate the seaman's estate as the proper beneficiary of the judgment, and designate his personal representative, the executrix of his estate, as the proper party to be substituted for the deceased seaman.

(Prior Writ Application)

QUESTIONS PRESENTED FOR REVIEW

In a Jones Act and general maritime law personal injury case in state court under the "saving to suitors" clause, when the plaintiff seaman dies after award of a final judgment in his favor:

1. Does federal maritime law or state law determine the substantive beneficiary of the final judgment?

2. Does federal maritime law designate the seaman's estate as the substantive beneficiary of the final judgment?

(Present Writ Application)

Contrary to what petitioner now contends, she presented both procedural and substantive arguments in her prior writ. This Honorable Court apparently considered her position and correctly denied the writ on February 19, 1991. Respondents respectfully submit that her return to this forum now is a frivolous action and constitutes abuse of the appellate process, resulting in a waste of time and resources for the Court as well as the litigants.

Finally, although respondents will defer to their brief filed in opposition to the executrix's initial writ application as being relevant herein, it is important to stress the untenable nature of petitioner's position, as evidenced by her reliance on the case of Connors v. Gallick, 339 F.2d 381 (6th Cir. 1964), which she asserts to be controlling and dispositive of the issue at bar.

That case involved a railroad employee who died pending appeal subsequent to receiving a judgment in the trial court. The court held that the survivorship provision of FELA did not apply to a settlement and that the judgment became part of decedent's estate to the exclusion of a daughter, who had never known her father. A careful reading of this case reveals the important fact that **the litigation was no longer pending**; the judgment had been finalized by settlement. Subsequent to the settlement, the daughter filed suit to participate in the settlement. The court, of course, held that the settlement funds went to the estate and not to the questionable daughter, as the settlement funds recovered in the instant case from ancillary defendants became part of Mr. Mistich's estate upon his death. The court further stated in Connors, at page 385, that had the litigation continued and the trial court judgment been reversed or a new trial been granted, the action would continue for the benefit of the listed beneficiaries. Appellees submit that is precisely what is transpiring in this matter: an action in which a judgment has been rendered, but which is not definitive, is pending and continues for the benefit

of the designated beneficiaries upon the death of the original plaintiff.

Should the trial court judgment be reversed or a new trial granted, the children of Stephen A. Mistich would irrefutably be the only parties to maintain the litigation. Hettie M. Minnicks, the executrix, would have no right at all. Respondents submit, therefore, that if uniformity is to be served, the correct decision has been made by the courts substituting the children as the proper parties in interest.

Although Connors v. Gallick can be considered an aberration in that it discusses 45 U.S.C. Section 59 in a context where it is not necessary, it is obvious that the executrix's reliance on this case is grossly misplaced. The case admittedly is dispositive and controlling of the issue at bar, but with the exact opposite result of what the executrix desires.

The executrix refuses to view the litigation as pending. She wants to treat the judgment as final and enforceable and is prepared to make the judgment part of the estate at this time. Clearly, this is not the situation that exists. The action is still pending and there is no definitive judgment. Therefore, under Connors v. Gallick, and all relevant state and federal law, the action survives for the benefit of decedent's children.

CONCLUSION

The decisions by this Honorable Supreme Court of the United States, the Supreme Court of the State of Louisiana, and the Louisiana Court of Appeal, Fourth Circuit, were all correct in denying the executrix's numerous attempts to intervene and in maintaining that the sole surviving children of Stephen A. Mistich are the proper parties to continue decedent's personal

injury litigation. This latest writ application reiterates what the executrix has previously argued to this Honorable Court and reflects her desperate effort to obtain the fruits of a judgment not rightfully hers.

Respondents submit that there is no federal issue involved here, much less any conflict with federal decisions. The executrix's argument for federal uniformity is merely a "red herring" to persuade this Honorable Court to review the proper determinations made by the various courts that have already adjudicated this matter. In fact, uniformity is served much more significantly by the decisions from which she appeals in that, should there be a reversal of the judgment or a new trial granted, the children would once again be the only proper parties plaintiff. The executrix then, as now, would have no right to intervene.

Respondents respectfully submit that Hettie M. Minnicks' writ application be denied once again based on the foregoing opposition and the opposition presented previously in conjunction with petitioner's prior writ application.

Respectfully submitted,

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Counsel for Respondents

APPENDIX 1

STEPHEN A. MISTICH	*	NO. 89-CA-1420
VERSUS	*	COURT OF APPEAL
BROWN & ROOT, INC.	*	FOURTH CIRCUIT
	*	STATE OF LOUISIANA

* * * * * * * * * * * *

ORDER

Motion to stay proceedings pending determination of proper party substitution is denied.

Motion to substitute Hettie M. Minnicks executrix of the Succession of Stephen A. Mistich is denied. Nathan v. Touro Infirmary, 512 So.2d 352 (La. 1987).

New Orleans, Louisiana, this 1st day of June, 1990.

(SIGNED) RFB
Judge Rudolph F. Becker, III

(SIGNED) DAB
Judge Denis A. Barry

(SIGNED) JBA
Judge Joan Bernard Armstrong

APPENDIX 2

STEPHEN A. MISTICH	*	NO. 89-CA-1420
VERSUS	*	COURT OF APPEAL
BROWN & ROOT, INC.	*	FOURTH CIRCUIT
	*	STATE OF LOUISIANA

* * * * * * * * * * *

PEREMPTORY EXCEPTION OF NO RIGHT OF ACTION

MOTION IS DENIED.

The peremptory exception of no right of action brought by Brown and Root, Inc. is denied. Under the circumstances of this case the children of Stephen A. Mistich were merely substituted as proper parties plaintiff in a personal injury claim which their father had already asserted and had obtained judgment. This is not a situation where there exists a "survival action" claim to be prosecuted and therefore the rules under the Jones Act and general maritime law relative to what party has the right to assert the claim does not apply.

New Orleans, Louisiana this 4th day of September, 1990.

(SIGNED) RFB
Judge Rudolph F. Becker, III

(SIGNED) DAB
Judge Denis A. Barry

(SIGNED) JBA
Judge Joan Bernard Armstrong

APPENDIX 3

THE SUPREME COURT OF THE STATE OF LOUISIANA

STEPHEN A. MISTICH

VS. NO. 90-OC-1241

PIPELINES INC. ET AL

- - - - - - - - - - -

IN RE: Minnicks, Hettie M.; - Other(s); Applying for Supervisory and/or Remedial Writs; to the Court of Appeal, Fourth Circuit, Number 89CA-1420; Parish of Plaquemines 25th Judicial District Court Div. "B" Number 29-703

- - - - - - - - - - -

September 14, 1990
Denied.

JCW
WFM
JLD
LFC
PH

LEMMON, J., would grant the writ.

Supreme Court of Louisiana
September 14, 1990

(SIGNED) JTO
Deputy Clerk of Court
For the Court

APPENDIX 4

STEPHEN A. MISTICH	*	NO. 89-CA-1420
VERSUS	*	COURT OF APPEAL
BROWN & ROOT, INC.	*	FOURTH CIRCUIT
	*	STATE OF LOUISIANA

* * * * * * * * * * *

The Petition for Intervention filed by Hettie M. Minnick is denied. Under Louisiana Code of Civil Procedure Article 801 and Louisiana Civil Code Article 2315.1 the proper party to be substituted as the legal successor are the children of the deceased plaintiff.

New Orleans, Louisiana, this 28th day of December, 1990.

(SIGNED) RFB
Judge Rudolph F. Becker, III

(SIGNED) DAB
Judge Denis A. Barry

(SIGNED) JBA
Judge Joan Bernard Armstrong

APPENDIX 5

THE SUPREME COURT OF THE STATE OF LOUISIANA

STEPHEN A. MISTICH

VS. NO. 90-OC-0164

PIPELINES INC. ET AL

- - - - - - - - - - -

IN RE: Minnicks, Hettie M.; - Other(s); Applying for Supervisory and/or Remedial Writs; Parish of Plaquemines 25th Judicial District Court Div. "B" Number 29-703; to the Court of Appeal, Fourth Circuit, Number 89CA-1420

- - - - - - - - - - -

February 22, 1991
Denied.

JCW
WFM
JLD
LFC
PH

LEMMON, J., would grant the writ.

Supreme Court of Louisiana
February 22, 1991

(SIGNED) FJL
Clerk of Court
For the Court

APPENDIX 6

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

February 19, 1991

Mr. Lawrence D. Wiedemann
821 Baronne St.
P. O. Box 30648
New Orleans, LA 70190-0648

RE: Hettie M. Minnicks, Executrix of the Succession
of Stephen A. Mistich
v. Brandon L. Mistich, et al
No. 90-1082

Dear Mr. Wiedemann:

The Court today entered the following order in the above entitled case:

The petition for a writ of certiorari is denied.

Very truly yours,

SIGNED WKS
William K. Suter, Clerk